

OGC Has Reviewed

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3. Mail Covers and Intercepts

(a) Mail cover operations: A mail cover, as defined in U.S. Postal Service regulations, 14/ is an investigative technique that involves the recording of any data that appear on the outside cover of any class of mail, including the name and address of the sender and addressee. Apparently by analogy to physical surveillance (see Part C, infra), courts have held that mail cover operations of this sort do not infringe Fourth Amendment rights and do not require judicial warrant. 15/ The Postal Service regulations also define mail covers to include the opening and inspection of any mail other than first-class mail. Under Ex parte Jackson, 16/ Fourth Amendment protection applies to "letters and sealed packages. . . closed against inspection. . . ." By statute and implementing regulations, only first-class mail is "sealed against inspection;" 17/ all other mail classes may be inspected in the Postal Service's discretion. Thus, the theory is that by choosing to employ other than first-class mail, the sender foregoes any expectation of privacy and, hence, any Fourth Amendment protection.

Despite the apparent absence of any Fourth Amendment restrictions on mail cover operations, abuse of the technique clearly is, or should be, a matter of concern. For example, it is conceivable that the technique could be employed as a means -- albeit imperfect -- of identifying the names of members of, or sympathizers with, unpopular political or social groups, possibly -- by analogy to cases like NAACP v. Alabama -- infringing on First Amendment rights and certainly touching First Amendment concerns. 18/

Postal Service regulations allow institution of mail covers only on order of the Chief Postal Inspector or his specified delegate, and only when, inter alia, "written request is received from any law enforcement agency" specifying "the reasonable groups that exist which demonstrate the mail cover is necessary to (A) protect the national security, (B) locate a fugitive, or (C) obtain information regarding the commission or attempted commission of a crime." 19/ "Law enforcement agency" is defined as "any authority of the Federal Government or any authority of a

14/ 39 CFR § 233.2

15/ E.g., Lustiger v. United States, 386 F.2d 132 (CA 9, 1967)

16/ 96 U.S. 727, 733 (1878)

17/ 39 U.S.C. § 3623

18/ But see Cohen v. United States, 378 F.2d 751 (CA 9, 1967)

19/ 39 CFR 233.2(d)

State or local government one of whose functions is to investigate the commission or attempted commission of acts constituting a crime" -- a curious definition, since the grounds for mail covers are not confined to law enforcement purposes. 20/ The regulations contain no definition of the term "national security." Mail covers instituted for criminal law enforcement remain in effect for 30 days, but may be extended for additional 30-day periods. "National security" mail covers remain in force for a maximum of 120 days, unless extended by the Chief Postal Inspector.

In light of the possibility of abuse in employing mail covers, the central problems presented by the existing law are: (1) the possible ambiguity as to which federal agencies may request mail covers; (2) the lack of any definition of the term "national security;" and (3) reposing in the Chief Postal Inspector exclusive responsibility for controlling the propriety and duration of mail covers, especially when employed for national security purposes.

(b) Mail intercepts and opening: The Supreme Court has long held that first-class mail -- "letters and sealed packages. . . closed against inspection" -- is subject to Fourth Amendment protection. 21/ Fourth Amendment protection varies, of course, depending on circumstances. Thus, all mail originating outside the United States is subject to customs examination, at least when there is reasonable cause to suspect that it contains merchandise imported contrary to law. Presumably, however, first-class mail originating in the United States would be protected by the Fourth Amendment even after it has left the territory of the United States. Normally, therefore, a judicial warrant must be obtained before opening any first-class mail originating in the United States or, except for the purpose of customs inspection, outside the United States. Moreover, there remains some question whether mail may be searched for criminal

20/ 39 CFR § 233.2(c)(4)

21/ Ex parte Jackson, supra; United States v. Van Leeuwen, 397 U.S. 249 (1970).

law enforcement purposes -- even with a warrant -- if it contains only writings evidencing crime, rather than contraband or criminal instrumentalities. 22/

Logically, however, the foreign intelligence exception to the warrant requirement recognized in the Brown and Butenko decisions would seem to apply as much to mail openings as to electronic surveillance. Thus, as a constitutional matter, the search of first-class mail, at least that originating from foreign powers or their agents, presumably would be permissible if there is reason to believe that it contains foreign intelligence information, and if the primary purpose of the search is to obtain such information.

There are, however, strict statutory restrictions on first-class mail searches. 18 U.S.C. § 1703(a) prohibits postal employees from "improperly" opening or allowing others to open first-class mail, and prohibits all other persons from opening first-class mail "without authority." 18 U.S.C. § 1702 prohibits taking letters, packages or postal cards from the mails "with design... to pry into the business or secrets of another" and also prohibits the opening of such mail. Both provisions carry criminal penalties. The qualifying phrases of § 1703(a) and, by necessary implication, § 1702 must, however, be read in light of 39 U.S.C. § 3623(d) which defines when and by whom first-class mail of domestic origin may be opened. The section provides that no first-class letter of domestic origin "shall be opened except under authority of a search warrant authorized by law, or by an officer or employee of the Postal Service for the sole purpose of determining an address at which the letter can be delivered, or pursuant to the authorization of the addressee." Thus, even though opening first-class mail, originating in the United States, for foreign intelligence purposes may be constitutionally permissible without warrant, such warrantless searches may be prohibited by statute.

The present legal framework raises, therefore, the following ambiguities and questions:

22/ The Supreme Court left this question open in Warden v. Hayden, 387 U.S. 294, 302-03 (1967); the Second Circuit, however, has rejected any limitation on the type of material subject, pursuant to warrant, to search and seizure. United States v. Bennett, 409 F.2d 888 (1969).

(1) With respect to first-class mail originating outside the United States, may searches be conducted without warrant for foreign intelligence purposes? This question turns on whether § 1702 and § 1703 should be read as exempting constitutionally permissible searches from their prohibitions. Moreover, whether a search is or is not constitutionally permissible may depend in major part on whether it was properly authorized.

(2) With respect to mail originating in the United States, should § 3623 be read to preclude searches properly authorized by the President and constitutionally permissible, without a warrant, under Brown and Butenko? If § 3623 does preclude such searches, does Congress have the power so to restrict the power of the President?

The Criminal Division of the Department of Justice currently has these issues under study in connection with investigations of the legality of the CIA's mail opening operations between the early 1950's and 1973. 23/ No decision has yet been reached in these matters. For prospective purposes, however, the problems lie in the ambiguity of the statutory scheme. Moreover, it must be recognized that apart from the substantial constitutional and statutory questions, searches of letters and documents in the mails, even if legally permissible, are a particularly abrasive infringement of privacy, and there is a need for standards and controls to govern their use.

23/ See Rockefeller Commission Report, at 101-15.